

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHERRY HAYES,

Plaintiff, No. CIV S-04-2652 KJM

VS.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant. ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying applications for Disability Income Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act (“Act”), respectively. For the reasons discussed below, the court will deny plaintiff’s motion for summary judgment or remand and grant the Commissioner’s cross-motion for summary judgment.

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1 I. Factual and Procedural Background

2 In a decision dated July 29, 2004, the ALJ determined plaintiff was not disabled.¹
3 The ALJ's decision became the final decision of the Commissioner when the Appeals Council
4 denied plaintiff's request for review. The ALJ found plaintiff has severe impairments of left
5 lateral epicondylitis, left shoulder strain and personality disorder but these impairments do not
6 meet or medically equal a listed impairment; plaintiff retains the residual functional capacity to
7 perform light work that would require only occasional reaching in all directions with her non-
8 dominant left upper extremity and work that is simple, repetitive and would not require extensive
9 contact with coworkers, supervisors and the public; plaintiff can perform her past relevant work

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11 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
12 Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income ("SSI") is paid
13 to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Under both provisions, disability
14 is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a
medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) &
1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.
15 §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The
following summarizes the sequential evaluation:

16 Step one: Is the claimant engaging in substantial gainful
activity? If so, the claimant is found not disabled. If not, proceed
17 to step two.

Step two: Does the claimant have a "severe" impairment?
If so, proceed to step three. If not, then a finding of not disabled is
18 appropriate.

Step three: Does the claimant's impairment or combination
19 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
404, Subpt. P, App.1? If so, the claimant is automatically
20 determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past
work? If so, the claimant is not disabled. If not, proceed to step
21 five.

Step five: Does the claimant have the residual functional
22 capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled. _____

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24 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

25 The claimant bears the burden of proof in the first four steps of the sequential evaluation
26 process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. Id.

1 as a cannery worker; and plaintiff is not disabled. Administrative Transcript (“AT”) 20. Plaintiff
2 contends the ALJ improperly assessed the severity of her impairments, improperly discredited
3 her subjective complaints, and incorrectly found she could perform her past relevant work.

4 II. Standard of Review

5 The court reviews the Commissioner’s decision to determine whether (1) it is
6 based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the
7 record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing
8 Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)).
9 Substantial evidence means more than a mere scintilla of evidence, but less than a
10 preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorenson v.
11 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402
13 U.S. 389, 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.
14 197, 229, 59 S. Ct. 206 (1938)). The record as a whole must be considered, Howard v. Heckler,
15 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that
16 detracts from the ALJ’s conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir.
17 1985). The court may not affirm the ALJ’s decision simply by isolating a specific quantum of
18 supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If
19 substantial evidence supports the administrative findings, or if there is conflicting evidence
20 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see
21 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an
22 improper legal standard was applied in weighing the evidence, see Burkhardt v. Bowen, 856 F.2d
23 1335, 1338 (9th Cir. 1988).

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1 III. Analysis

2 A. Severity of Impairments

3 Plaintiff contends the ALJ improperly assessed the severity of her left arm and
4 mental impairments. An impairment is not severe only if it “would have no more than a minimal
5 effect on an individual’s ability to work, even if the individual’s age, education, or work
6 experience were specifically considered.” SSR 85-28. The purpose of step two is to identify
7 claimants whose medical impairment is so slight that it is unlikely they would be disabled even if
8 age, education, and experience were taken into account. Bowen v. Yuckert, 482 U.S. 137, 107 S.
9 Ct. 2287 (1987). “The step-two inquiry is a de minimis screening device to dispose of
10 groundless claims.” Smolen v. Chater 80 F.3d 1273, 1290 (9th Cir. 1996).

11 The ALJ found plaintiff suffered severe impairments of left lateral epicondylitis,
12 left shoulder strain and personality disorder. AT 20. Plaintiff contends the extent of her
13 impairments, however, is greater than that found by the ALJ. The record fails to support
14 plaintiff’s contention. Plaintiff underwent a comprehensive orthopedic evaluation by Dr.
15 McIntire on June 5, 2004. AT 218-221. Functional limitations found by Dr. McIntire included a
16 restriction on lifting and avoidance of extremely forceful pulling or pushing with the left upper
17 extremity. AT 221. No other manipulative limitations were assessed. Similar functional
18 limitations were assessed by the state agency reviewing physician. AT 142-149. Although an
19 electrodiagnostic study performed just prior to Dr. McIntire’s examination noted
20 electrophysiologic evidence of left carpal syndrome, the report specifically recommended
21 correlation with physical exam, which as discussed above, was negative. AT 257.² The study
22 also noted plaintiff’s electromyogram of the upper extremities was within normal limits,
23 including median enervated muscles distal to the wrists. AT 256. Physical examinations of
24 plaintiff indicated that although plaintiff had a decreased range of motion in the left shoulder in

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² See note 7 infra.

1 January and March 2003, plaintiff demonstrated full range of motion in the left shoulder by
2 September 30, 2003. AT 157, 159, 207, 220. On this record, there was no error in the ALJ's
3 assessment of plaintiff's physical impairments.

4 With respect to plaintiff's mental impairment, plaintiff contends the ALJ
5 committed error in not specifically addressing the GAF³ of 55 assessed by Dr. Kalman. AT 171.
6 The ALJ did not reject Dr. Kalman's assessment, as claimed by plaintiff. Although Dr. Kalman
7 assessed plaintiff's GAF as 55 on the date plaintiff was examined, Dr. Kalman also found
8 plaintiff could relate and interact with supervisors and co-workers, could deal with the public,
9 was able to understand, remember, and execute simple one- and two-step job instructions and
10 was able to withstand the stress and pressures associated with daily work activities on a basic
11 level. AT 171. Although Dr. Kalman found plaintiff could not maintain concentration and
12 attention, the residual mental functional capacity found by the ALJ to limit plaintiff to work that
13 is simple and repetitive accommodated this limitation. AT 20. Similarly, the ALJ incorporated
14 the limitations found by examining psychiatrist Dr. Canty by limiting plaintiff to work that would
15 not require extensive contact with coworkers, supervisors and the public. AT 20, 233. The
16 ALJ's assessment of plaintiff's mental impairment is consistent with both examining
17 psychiatrists and plaintiff's treating general practitioner, who did not refer plaintiff for mental
18 health evaluation but prescribed some psychotropic medications as part of plaintiff's general
19 medical care. AT 153-54, 159, 162, 166-67. In light of this record, there was no error in failing
20 to discuss the assessments of the state agency physicians, which also are consistent with the
21 functional mental limitations found by the ALJ. AT 182, 186-87.

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24 ³ GAF is a scale reflecting the "psychological, social, and occupational functioning on a
25 hypothetical continuum of mental health-illness." Diagnostic and Statistical Manual of Mental
26 Disorders at 34 (4th ed. 2000) ("DSM IV-TR"). A GAF of 51-60 indicates moderate symptoms
(e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in
social, occupational, or school function (e.g., few friends, conflicts with peers or co-workers.)

1 B. Credibility

2 Plaintiff also contends the ALJ improperly discredited her subjective complaints.
3 The ALJ determines whether a disability applicant is credible, and the court defers to the ALJ's
4 discretion if the ALJ used the proper process and provided proper reasons. See, e.g., Saelee v.
5 Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an explicit
6 credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.
7 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be
8 supported by "a specific, cogent reason for the disbelief").

9 In evaluating whether subjective complaints are credible, the ALJ should first
10 consider objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947
11 F.2d 341, 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment,
12 the ALJ then may consider the nature of the symptoms alleged, including aggravating factors,
13 medication, treatment and functional restrictions. See id. at 345-47. The ALJ also may consider:
14 (1) the applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent
15 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a
16 prescribed course of treatment, and (3) the applicant's daily activities. Smolen v. Chater, 80 F.3d
17 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR
18 55406-01; SSR 88-13. Work records, physician and third party testimony about nature, severity
19 and effect of symptoms, and inconsistencies between testimony and conduct also may be
20 relevant. Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure
21 to seek treatment for an allegedly debilitating medical problem may be a valid consideration by
22 the ALJ in determining whether the alleged associated pain is not a significant nonexertional
23 impairment. See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may
24 rely, in part, on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453, 1458
25 (9th Cir. 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900 F.2d 172,
26 177 n.6 (9th Cir. 1990). "Without affirmative evidence showing that the claimant is malingering,

1 the Commissioner's reasons for rejecting the claimant's testimony must be clear and
2 convincing." Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.
3 1999).

4 Plaintiff testified she could not work because of pain and numbness in her left arm
5 and swelling in her feet, she could not sit or stand for more than an hour, and she could not deal
6 with people in public. AT 36, 41-42, 44. The ALJ discredited these limitations for several
7 reasons. The ALJ noted the inconsistency between the extreme limitations claimed by plaintiff
8 and the objective evidence in the medical record. AT 17-19, 142-49, 152-53, 156, 164, 169-171,
9 221. The ALJ also noted that plaintiff's self-reported hobbies included activities that would be
10 precluded if plaintiff were as limited as she claimed. AT 19, 105. Contradictions between
11 plaintiff's statements and the report on her activities made by a friend also were factored into the
12 credibility determination. AT 18-19, 98-103. The ALJ also considered plaintiff's report to her
13 treating physician that her mental problems were improved with medications. AT 17, 154. The
14 ALJ also relied on inconsistencies in plaintiff's presentation upon psychiatric examination noted
15 by the examining psychiatrist. AT 17, 230. The factors considered by the ALJ were all valid and
16 supported by the record. The ALJ's credibility determination was based on permissible grounds
17 and will not be disturbed.

18 C. Past Relevant Work

19 Plaintiff contends the ALJ committed error at step four of the sequential
20 evaluation by finding plaintiff could perform her past relevant work as a cannery worker.
21 Plaintiff bears the burden of proof at step four; however, the ALJ must make the requisite factual
22 findings to support his conclusion. Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001). To
23 find a plaintiff not disabled at step four, the ALJ must find plaintiff is able to perform: (1) the
24 actual functional demands and job duties of a particular past relevant job; or (2) the functional
25 demands and job duties of the occupation as generally required by employers throughout the
26 national economy. Id. at 845.

1 “Social Security Regulations name two sources of information that may be used to
2 define a claimant's past relevant work as actually performed: a properly completed vocational
3 report and the claimant's own testimony” Id. (citations omitted). “[T]he best source for how a
4 job is generally performed is usually the Dictionary of Occupational Titles.” Id. at 845-46
5 (citations omitted).

6 In this case, the ALJ specifically relied on the DOT⁴ in determining plaintiff could
7 perform her past relevant work, citing section 529.686-014.⁵ AT 20, Finding no. 7. Plaintiff
8 argues that limitations with respect to reaching with her left arm and holding objects with her left
9 hand precluded her from being able to do this kind of work. The ALJ's determination, however,
10 is consistent with the record. The ALJ limited plaintiff to occasional use of her left hand and
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14 ⁴ The United States Dept. of Labor, Employment & Training Admin., Dictionary of
15 Occupational Titles (4th ed. 1991) (“DOT”) is routinely relied on by the Social Security
16 Administration “in determining the skill level of a claimant's past work, and in evaluating
17 whether the claimant is able to perform other work in the national economy.” Terry v. Sullivan,
18 903 F.2d 1273, 1276 (9th Cir. 1990). The DOT classifies jobs by their exertional and skill
19 requirements. The DOT is a primary source of reliable job information for the Commissioner.
20 C.F.R. § 404.1566(d)(1).

21 ⁵ That section provides as follows:

22 **529.686-014 CANNERY WORKER (can. & preserv.)**

23 1. Performs any combination of following tasks to can, freeze, preserve, or pack food
24 products: Dumps or places food products in hopper, on sorting table, or on conveyor.
25 Sorts or grades products according to size, color, or quality. Feeds products into
26 processing equipment, such as washing, refrigerating, peeling, coring, pitting, trimming,
grinding, dicing, cooking, or slicing machines. Trims, peels, and slices products with
knife or paring tool. Feeds empty containers onto conveyor or forming machines. Fills
containers, using scoop or filling form, or packs by hand [PACKAGER, HAND (any
industry) 920.587-018]. Counts, weighs, or tallies processed items according to
specifications. Inspects and weighs filled containers to ensure product conforms to quality
and weight standards. Places filled containers on trays, racks, or into boxes. Loads,
moves, or stacks containers by hand or handtruck, and cleans glass jar containers, using
airhose. May be designated according to work performed as Dumper (can. & preserv.);
Peeler (can. & preserv.); Sorter (can. & preserv.); Trimmer (can. & preserv.).

27 GOE: 06.04.15 STRENGTH: L GED: R2 M2 L2 SVP: 2 DLU: 78

1 light work,⁶ and this limitation was consistent both with the medical record and plaintiff's own
2 testimony. AT 20, 143, 145, 158, 159, 166-68, 221, 225, 257⁷; cf. AT 35 (plaintiff testified she
3 lifted cans off of line but only had to lift gallon⁸ cans ten times per day);⁹ AT 42 (plaintiff
4 testified she could reach with left arm for five minutes and hold objects with left hand for a few
5 minutes). The job description as provided in the DOT, which required only the performance of
6 unskilled, repetitive tasks and limited contact with coworkers, supervisors and the public, also is
7 consistent with the mental limitations found by the ALJ, which are supported by the record.
8 AT 20, 171, 182, 186-87, 230. There was no error in the step four analysis.

9 The ALJ's decision is fully supported by substantial evidence in the record and

10 ⁶ 20 C.F.R. § 404.1567(b) provides:

11 Light work involves lifting no more than 20 pounds at a time with
12 frequent lifting or carrying of objects weighing up to 10 pounds.
13 Even though the weight lifted may be very little, a job is in this
14 category when it requires a good deal of walking or standing, or
15 when it involves sitting most of the time with some pushing and
pulling of arm or leg controls. To be considered capable of
performing a full or wide range of light work, you must have the
ability to do substantially all of these activities.

16 ⁷ Plaintiff underwent an electrodiagnostic evaluation on May 13, 2004, a date preceding
the date of the ALJ's decision but postdating the hearing. The recommendation as a result of that
testing was plaintiff should have a trial wrist orthosis as an initial conservative management.
Because this evidence was incorporated into the record by the Appeals Council, the court has
considered it in determining whether substantial evidence supports the ALJ's decision. See
Harman v. Apfel, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (where plaintiff submitted additional
materials to the Appeals Council in requesting review of the ALJ's decision, court may properly
consider the additional materials because the Appeals Council addressed them in the context of
denying plaintiff's request for review); see also Ramirez v. Shalala, 8 F.3d 1449, 1451-52 (9th
Cir. 1993) (noting that where the Appeals Council declined to review the decision of the ALJ
after examining the entire record, including new material, court considers both the ALJ's decision
and the additional materials submitted to the Appeals Council). Here, only conservative
treatment was recommended and there is no evidence as to whether such treatment failed or was
even tried by plaintiff. Also, as discussed above, there was no clinical correlation with the nerve
conduction results and the electromyogram, even for the affected area, was within normal limits.

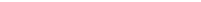
24 ⁸ The court takes judicial notice under Federal Rule of Evidence 201 that a gallon of
water weighs 8.345 pounds.

25 ⁹ The form filled out by plaintiff regarding her job duties conflicts somewhat with
plaintiff's testimony. AT 96. It was within the ALJ's province to resolve this conflict.

1 based on the proper legal standards. Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment or remand is denied, and
2. The Commissioner's cross-motion for summary judgment is granted.

4 || DATED: March 28, 2006.


UNITED STATES MAGISTRATE JUDGE

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